DIMAN HASSAN v. PENTADBIR TANAH & DAERAH HULU LANGAT & ORS

HIGH COURT MALAYA, SHAH ALAM
LIM CHONG FONG JC
[ORIGINATING SUMMONS NO: 21-146-2010]
25 JUNE 2015

LAND LAW: *Priorities – Land title – Two lands adjacent to each other and land overlap of 10,000 square feet between them – Plaintiff first to be registered as proprietor – Whether should be accorded priority – Whether first title in time must prevail*

CIVIL PROCEDURE: *Summary disposal of order – Rules of Court 2012, O. 14A – Disposal of case on point of law – Application for – Priorities – Land title – Two lands adjacent to each other and land overlap of 10,000 square feet between them – Plaintiff first to be registered as proprietor – Whether should be accorded priority – Whether issues could be determined without full trial*

This was an application made by the plaintiff for disposal of the case on a point of law pursuant to O. 14A of the Rules of Court 2012. The plaintiff was the registered proprietor of a piece of land which was surveyed and the land size re-determined from 2,787 square metres to 3,336 square meters in size. After payment of the additional premium, the plaintiff became the registered proprietor of the issued final title Lot 2449 on 28 November 2007. In the meantime, Ampang Development Sdn Bhd, who was a registered proprietor of another piece of land, also had its land re-surveyed and the land size was determined at 2,380 square meters. The issued final title of Lot 503135 was registered in the name of Ampang Development on 6 January 2009. By a sale and purchase agreement dated 28 May 2009, the fourth defendant purchased Lot 50135 from Ampang Development Sdn Bhd and the registration of the transfer of the said Lot was still pending. Lot 2449 and Lot 50135 were adjacent to each other and there was a land overlap of about 10,000 square feet between them. As a result of the land overlap, the concrete wall of the plaintiff on Lot 2449 had been demolished by the people in possession of Lot 50135. Consequently, the present suit was filed by the plaintiff. The plaintiff principally contended that he was the first to be registered as the proprietor and must therefore be accorded priority. The questions of law framed in the plaintiff's application were (i) a question of fact that was accepted by the parties as narrated above (Question 1.1); (ii) whether Lot 2449 or Lot 50315 ought to be accorded priority or was valid in accordance with the law in perpetuity (Question 1.2); and (iii) whether there was negligence on the part of the first to third defendants, the state agencies involved in land administration pursuant to the National Land Code, in having validated and registered Lot 2449 and Lot 50135 (Question 1.3).

Held (judgment for the plaintiff):

(1) This court was satisfied that there were critical questions herein that went to the root of the plaintiff's case that could be answered at this stage without the need for a trial (*Arshad Othman v. Lim Meng Chew @ Lim Yoke Soo & Anor*). (para 23)

(2) The principal problem here was the clash of the two final titles that had affected the overlapping land. By the aforesaid Supreme Court authority in *Tan Chiw Thoo v. Tee Kim Kuay*, it was clear that the first title in time must prevail and that was Lot 2449 as Lot 2449 was registered on 28 November 2007 whereas Lot 50135 was only registered on 6 January 2009. (para 25)

(3) After the survey, it was seen that the same title HS(M) 33027 PT100 incorporated the new survey plan no.83500 of land size of 3,336 square metres which was then followed up with the issuance of the final title PM Lot 7650 Lot 2449. Hence, for all intents and purposes, both the qualified title and the final title of Lot 50315 were issued after the issuance of the qualified title and the final title of Lot 2449 respectively. (paras 28 & 29)

(4) The land surveyor as appointed by the court had confirmed that there was indeed land overlap. Thus, Lot 2449 took priority over Lot 50135 as far as the overlapping area was involved. Accordingly, Question 1.1 and 1.2 of the notice of application was answered in the affirmative. No finding was made in respect of Question 1.3. (paras 30, 31 & 34)

Case(s) referred to:

Arshad Othman lwn. Lim Meng Chew @ Lim Yoke Soo & Satu Lagi [2011] 1 LNS 640 HC ***(refd)***

Ishmael Lim Abdullah v. Pesuruhjaya Tanah Persekutuan & Anor [2014] 7 CLJ 882 CA ***(refd)***

Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal [2003] 4 CLJ 337 CA ***(refd)***

Tan Chiw Thoo v. Tee Kim Kuay [1997] 1 CLJ 541 FC ***(refd)***

Legislation referred to:

Government Proceedings Act 1956, ss. 5, 6
National Land Code, ss. 22, 42(1)(a), 76, 78(3), 189, 190, 340(2)(c)
Rules of Court 2012, O. 14A, O. 40

For the plaintiff - Mohd Nadzim Ibrahim; M/s Azwan & Nadzim
For the 1st - 3rd defendants - Nik Haizie Azlin Nabidin; State Legal Advisor, Selangor
For the 4th defendant - Norfadilah Ahmad (Mohd Nurhazman Nurham with her); M/s JP Chong & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Lim Chong Fong JC:

Introduction

[1] This is an application made by the plaintiff dated 25 February 2015 for disposal of the case on a point of law pursuant to O. 14A of the Rules of Court 2012.

[2] The plaintiff is the registered proprietor of the piece of land held under final title PN7650 Lot 2449, Seksyen 15 Bandar Ampang, Daerah Ulu Langat of 3,336 square metres in size ("Lot 2449").

[3] The first to third defendants are the state agencies involved in land administration pursuant to the National Land Code 1965.

[4] The fourth defendant is the registered proprietor of the piece of land held under final title PN65618 Lot 50135, Seksyen 15 Bandar Ampang, Daerah Ulu Langat of 2,380 square metres in size ("Lot 50135").

[5] For the purposes of this application, the parties have consented to rely on the following documents filed in court for the factual matrix:

(i) Bundle of pleading;

(ii) Common bundle of documents between the plaintiff and first to third defendants;

(iii) Common bundle of documents between the plaintiff and the fourth defendant;

(iv) Report on survey of land title PN7650 (Lot 2449) and PN65618 (Lot 50135) by Seni Ukur Consult, licensed land surveyor appointed by the court pursuant to O. 40 of the Rules of Court 2012;

(v) Summary of facts of the case;

(vi) Issues to be tried;

(vii) Fourth defendant's affidavit affirmed by Ho Foo and Seng Swee Yin on 11 March 2015; and

(viii) First to third defendants' notice of intention to use affidavit dated 11 May 2015.

[6] After having read the written submissions of the parties, I heard counsel on 8 May 2015.

Salient Facts

[7] From the aforesaid documents, the following facts are common amongst the parties.

[8] The plaintiff was originally the registered proprietor of the land held under qualified title HS(M) 33027 PT100 of 2,787 square metres in size. This title was registered on 17 June 1997.

[9] The land was subsequently surveyed and the land size was re-determined at 3,336 square metres as in survey plan PA 83500 dated 19 July 1999. The increased land size was approved by the Selangor State Executive Council. After payment of the additional premium, the plaintiff became the registered proprietor of the issued final title Lot 2449. This title was registered on 28 November 2007.

[10] In the meantime, there was Ampang Development Sdn Bhd, another registered proprietor of land held under qualified title HS(D) 5562 PT01802 of land size of 0.28 hectares. This title was registered on 26 February 2000.

[11] The land was also subsequently re-surveyed and the land size was determined at 2,380 square metres as in survey plan PA 117362 dated 23 May 2008. The issued final title of Lot 50135 was registered in the name of Ampang Development Sdn Bhd on 6 January 2009.

[12] By a sale and purchase agreement dated 28 May 2009, the fourth defendant purchased Lot 50135 from Ampang Development Sdn Bhd. The registration of the transfer of Lot 50135 to the fourth defendant is still pending.

[13] Lot 2449 and Lot 50135 are adjacent to each other and there is land overlap of about 10,000 square feet between them as verified by Seni Ukur Consult.

[14] As the result of the land overlap, the concrete wall of the plaintiff on Lot 2449 has been demolished by people in possession of Lot 50135.

[15] Consequently, this suit is filed by the plaintiff.

Contentions Of The Plaintiff

[16] The plaintiff principally contended that he was the first in time to be registered as the proprietor and must therefore be accorded priority. Although the plaintiff has also claimed damages for negligence and breach of statutory duty on the part of the first to third defendants and trespass by the fourth defendant, the plaintiff has at the hearing stated his willingness to abandon this head of his claim for the demolished concrete wall.

[17] Accordingly, the plaintiff now primarily only claims for an order for:

(i) a declaration that Lot 2449 belongs to the plaintiff;

(ii) Lot 50135 be cancelled in entirety or amended in that part thereof that overlapped with Lot 2449 be cancelled; and

(iii) vacant possession of Lot 2449 and an injunction to restrain the fourth and fifth defendants from carrying out any activity on Lot 2449.

Contentions Of The Defendants

[18] The first to third defendants in gist retorted that the plaintiff's Lot 2449 was an expanded land that was later approved by the Selangor State Executive Council. However by that time, Lot 50135 was already alienated to Ampang Development Sdn Bhd. In the premises, the first and second defendants could not have validly alienated the land to the plaintiff on the principle of *nemo dat quod non habet* as applied in *Ishmael Lim Abdullah v. Pesuruhjaya Tanah Persekutuan & Anor* [2014] 7 CLJ 882; [2015] 2 MLJ 126. Accordingly by the provisions in ss. 42(1)(a), 76, 78(3) and 340(2)(c) of the National Land Code 1965, the plaintiff's final title in Lot 2449 is defeasible. As for the alleged negligence against the first to third defendants, the plaintiff has been put to strict proof and in any event subject to the procedural defence of non/misjoinder of parties as well as the substantive defence pursuant to the immunity provision under s. 22 of the National Land Code 1965.

[19] As for the fourth defendant, it was contended that Lot 50135 took priority over Lot 2449 based on the following highlighted opinion of Seni Ukur Consult in its expert report:

> Plan is prepared and drawn with respect to surveyed work carried out on both lots. Together with surrounding PA information from JUSEL and PA 83500 and PA 117362, a survey plan no. SE/434/SEL/2014/A was drawn. From the plan, the results depict both the lots were overlapping to each other. The overlapping area between both the lots were computed and tabulated on the plan too.
>
> From plan PA 117362 surveyed plan for lot 50136 and 50135, it was noted on the plan (highlighted in pink on the attached PA) that the surveyed work for both the lots is for part of lot 2449 and TK (state land: Pekeliling Ketua Pengarah Ukur & Pemetaan Bil. 6/2009). Therefore, plan PA 117362 survey plan for lot 50136 and lot 50135, is to supersede lot 2449. Technically, plan PA 117362 supersede plan PA 83500, hence, PN 65618 should supersede PN 7650…
>
> As mentioned in our findings, based on the note printed on the PA 117362, the surveyed work was carried out to supersede Lot 2449. Technically plan PA 117362 superseded plan PA 83500, hence land Title PN65618 should supersede Land Title PN7650. Therefore, there is no overlapping taken place as Lot 2449 is being superseded.

Findings Of The Court

[20] Order 14A of the Rules of Court 2012 provides:

> 14A. Disposal of case on point of law
>
> 1. Determination of questions of law or construction (O. 14A r. 1)
>
> (1) The Court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that -

A

(a) such question is suitable for determination without the full trial of the action; and

(b) such determination will finally determine the entire cause or matter or any claim or issue therein.

B

(2) On such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless the parties have had an opportunity of being heard on the question.

C

(4) The jurisdiction of the Court under this Order may be exercised by a Registrar.

(5) Nothing in this Order shall limit the powers of the Court under Order 18, rule 19 or any other provisions of these Rules.

2. Manner in which applications under rule 1 may be made (O. 14A r. 2)

D

An application under rule 1 may be made by a notice of application or, notwithstanding Order 32, rule 1, may be made orally in the course of any interlocutory application to the Court.

[21] In *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337; [2003] 5 AMR 669, the Court of Appeal laid down the following principles on an application under O. 14A:

E

In a nutshell, the Order enables the court to determine any question of law or construction of document where it appears to the court that such question is suitable for determination without the full trial of the action

F

and such determination will finally determine the entire cause or matter or any claim or issue therein. The Order is new to our civil procedure and hence, the few local decisions of the High Court on the ambit of Order 14A are not instructive. For that reason, we are inclined to refer to foreign cases decided on the equivalent of our Order 14A. In *Korso Finance Establishment Anstalt v. John Wedge* (unreported, February 15 1994, CA Transcript No 14/387), the English Court of Appeal laid down the following principles on the ambit of Order 14A -

G

1. An issue is "a disputed point of fact or law relied on by way of claim or defence".

H

2. A question of construction is well capable of constituting an issue.

3. If a question of construction will finally determine whether an important issue is suitable for determination under Order 14A and where it is a dominant feature of the case a court ought to proceed to so determine such issue.

I

4. Respondents to an application under Order 14A are not entitled to contend they should be allowed to hunt around for evidence or something that might turn up on discovery which could be relied upon to explain or modify the meaning of the relevant document.

> If these were material circumstances of which the court should take account in construing the document, they must be taken to have been known, and could only be such as were known, to the parties when the agreement was made. In the absence of such evidence the court should not refrain from dealing with the application. (see *The Supreme Court Practice 1999*, vol 1, paragraph 14A/2/5).

In the same case it was held -

> In my judgment the question of construction is well capable of constituting an issue in the cause or matter. An issue may be said to be a disputed point of fact or law relied on by way of claim or defence. In the present case the determination of the question of construction one way or the other will finally determine an important issue, namely whether the respondents are primarily liable under the agreement. If the determination is in favour of the appellant it will finally determine the entire matter …
>
> The whole case does not have to be disposed of. It is sufficient if substantial matters can be disposed of.
>
> The real question in this case at the end and really crucial one it seems to me is: will the court be able to dispose of the case or the major part of the case or the most significant issue in the case under Order 14A dealing with the matter today. (@ 17C of the transcript).
>
> Clearly one would prefer the facts to have been simpler, but the fact that they are complicated does not rule out the use of the Order. (@ 7 of the transcript).
>
> In my judgment, having rightly decided that the issue could properly be disposed of without evidence and discovery, if he decided on the side of the plaintiffs, it would determine the action. In any event the question of construction was a dominant feature of the case, and the judge ought to have proceeded to determine that issue. The postscript to his judgment, which refers to the desirability of the parties, as the judge put it, 'having their day in Court', should have been tempered by the reflection that Order 14A has lately been provided to avoid that expense and to assist parties in the efficient disposal of their actions. (@ 8 of the transcript).

[22] The questions of law framed in the plaintiff's application are:

(i) whether Lot 2449 or Lot 50135 ought to be accorded priority or is valid in accordance with the law in perpetuity (question 1.2)?; and

(ii) whether there was negligence on the part of the first to third defendants in having validated and registered Lot 2449 and Lot 50135 (question 1.3)?

The other question 1.1 is a question of fact that is now accepted by the parties as narrated in para. 13 hereinabove.

[23] I am satisfied that these are critical questions that go to the root of the plaintiff's case that can be answered at this stage without the need for a trial; see *Arshad Othman lwn. Lim Meng Chew @ Lim Yoke Soo & Satu Lagi* [2011] 1 LNS 640; [2011] MLJU 598.

[24] In the Federal Court case of *Tan Chiw Thoo v. Tee Kim Kuay* [1997] 1 CLJ 541; [1997] 2 MLJ 221 where two document of titles were issued for the same land, Peh Swee Chin FCJ said as follows at pp. 548 to 549 (CLJ); pp. 229 to 230 (MLJ):

> The learned trial judge, on the question of indefeasibility of title correctly relied on s. 340 of the Code and *Bank Bumiputra Malaysia Bhd v. Mahmud bin Hj Mohd Din (Datin Hjh Salma bte Mohd Jamin, Intervener)* [1989] 1 MLJ 381. Alienation of the lot which was State land had taken effect upon registration of the register document of title to the first title holder in September 1968. Such indefeasibility of title can only be defeated by any of the specified statutory grounds of fraud, etc under s. 340 or other grounds of equity, see for example, *Tham Kong v. Oh Hiam & Ors* [1968] 1 MLJ 44. None of such statutory grounds or other grounds of equity relating to the issue of the document of title to the first title holder exists. The indefeasibility of title for the first title holder cannot be challenged.
>
> *Clearly, it follows that the document of title of the second title holder is void against that of the first title holder. On another alternatively sufficient ground, apart from indefeasibility of title, it is void also as a document of title to land, and therefore against the first title holder also, because the lot could not be alienated by the state authority, since it was no longer State land. To alienate it in these circumstances would be a wanton disregard of the express statutory provisions which provide for alienation only of State land such that it would amount to a failure to observe the mandatory statutory provisions of the Code*. See *Pow Hing & Anor v. Registrar of Titles, Malacca* [1981] 1 MLJ 155 (FC). *The purported alienation to the second title holder was a nullity, in our opinion, to such an extent on the facts of this case, that had there been a purchaser in good faith and for valuable consideration of the title of the second title holder, for the sake of illustration, such a purchaser would have obtained neither title nor interest of the lot, in other words, the proviso to sub-s. (3) of s 340 of the Code would not apply to assist such a purchaser*. (emphasis added)

[25] The principal problem here in my view is the clash of two final titles that affects the overlapping land. By the aforesaid Federal Court authority, it is clear that the first title in time must prevail and that is Lot 2449. To recapitulate, Lot 2449 was registered on 28 November 2007 whereas Lot 50135 was only registered on 6 January 2009.

[26] The first to third defendants' contention seems to be that the expanded sized land in Lot 2449 was the result of the further alienation of land to the plaintiff over and above that alienated pursuant to the land held under qualified title HS(M) 33027 PT100. Thus according to the first to third

defendants, it could not prevail over that of Lot 50135 then held under HS(D) 5562 PT01802 that was already alienated to Ampang Development Sdn Bhd prior thereto.

[27] The contention of the first to third defendants is however not supported by the factual documentary evidence before me that there was indeed further alienation of land to the plaintiff. There is in this regard no further title issued for the expanded land that was then amalgamated with HS(M) 33027 PT100 to form Lot 2449. In my view, the expansion on the balance of probabilities is the result of the re-survey of the land then held under qualified title HS(M) 33027 PT100 pursuant to ss. 189 and 190 of the National Land Code 1965 which provide:

> 189. Conversion to take place after survey
>
> Where any land held under qualified title has been duly surveyed in accordance with the provisions of section 396, final title may be issued in continuation of the qualified title in accordance with the following provisions of this Chapter.
>
> 190. Procedure in case of land alienated under qualified title
>
> 1) In the case of land which became held under qualified title upon alienation -
>
> (a) the provisions of section 83 shall apply to its survey for the purposes of the issue of final title;
>
> (b) on completion of the survey, all items of land revenue previously paid in respect thereof which were computed on the basis of the area provisionally approved for alienation shall be recomputed on the basis of the actual area of the land as established by the survey; and
>
> (c) any amounts underpaid or overpaid in respect of any such item, or in respect of survey fees, shall become payable to or by the State Authority and, in the case of amounts underpaid, shall be paid before final title is issued.
>
> (2) For the purposes of paragraph (b) of sub-section (1), the provisions of sub-sections (1) and (2) of section 96 shall apply to the computation of premiums as they apply to the computation of rents.

[28] After the survey, it is seen that the same title HS(M) 33027 PT100 incorporated the new survey plan no. 83500 of land size of 3,336 square metres which was then followed up with the issuance of the final title PM7650 Lot 2449.

[29] Hence for all intents and purposes, both the qualified title and the final title of Lot 50135 were issued after the issuance of the qualified title and the final title of Lot 2449 respectively.

[30] As for the contention of the fourth defendant, the land surveyor as appointed by the court has confirmed that there was indeed land overlap. Beyond that, it is my view that his opinion as to how he perceived the overlapping problem had occurred is irrelevant. This is because the resolution of the problem is dependent upon and centred on a question of law of priority between competing titles.

[31] In the premises, I find and hold that Lot 2449 takes priority over Lot 50135 as far as the overlapping area is involved.

[32] Since the plaintiff has abandoned his claim for the demolished concrete wall, it is unnecessary for me to make a finding whether the first to third defendants are negligent *vis a vis* the plaintiff and to consider the other procedural and substantive defences based on ss. 5 & 6 of the Government Proceedings Act 1956 and s. 22 of the National Land Code 1965.

Conclusion

[33] By virtue of the foregoing findings, I am mindful that there will be loss and damage inflicted upon the fourth defendant. Since there is no counterclaim brought by the fourth defendant against the other defendants herein, this has to await another litigation unless the matter can be amicably resolved amongst them in due course.

[34] Accordingly, I answer the questions set out in paras. 1.1 and 1.2 of the notice of application in the affirmative. No finding is made in respect of para. 1.3.

[35] Based on the foregoing answers, I therefore enter judgment by granting an order in terms of prayer (ai), prayer (bi) to the extent that the land size on Lot 50135 is reduced so as not to encroach onto the plaintiff's Lot 2449, prayer (c) , and prayer (f) of the originating summons that is converted to a writ of summons.

[36] The costs of this action is to be borne by the first to third defendants which is fixed at RM15,000. There is no order as to costs against the fourth defendant.